Predictable Harm: Should the Media Be Liable?

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INTRODUCTION

A fourteen-year-old girl in Winona, Minnesota, recently watched the movie "Tarantulas: The Deadly Cargo." Allegedly, she went to a pet shop, purchased one such spider, and placed it in her parents' bed. After discovering the tarantula, the parents informed the juvenile authorities that the girl had threatened them prior to watching the movie.[1] The police in East Chicago, Indiana, foiled a bank hold-up but described it as "a well-planned robbery—just like in the movies."[2] These two incidents—recent examples of life imitating art—are neither isolated nor unforeseeable. A steady pattern of such occurrences has emerged over a number of years.

On September 30, 1973, the movie "Fuzz" was shown on Boston television. The movie contained a scene depicting a "wino" being doused with gasoline and then being set on fire. Two days later, several Boston youths doused a woman with gasoline and set her on fire.[3] On March 2, 1971, the movie "Doomsday Flight" was shown on Australian television. The movie depicted a unique method of extorting money from a major airline. Twenty-four days following the television showing of the film, an extortion attempt was made on Quantas Airlines in exactly the same manner as that portrayed in the movie.[4] These two examples are further illustrations of events that have caused experts in the fields of psychology and sociology to examine whether the portrayal of particular types of violence on television or in movies prompts persons to mimic that violence in real life.

This Article suggests that, in certain circumstances, television and movie producers should be able to predict with reasonable certainty that a harmful, violent act is likely to result from showing a unique act of violence. The basis for this conclusion is established by examining sociological and psychological studies on individual responses to the observation of violence shown on television or in movies.[5] I believe these studies conclusively establish that a causal relationship exists and, therefore, legal liability for any resulting harm should attach. I submit a need exists for either: (1) a new judicially created tort theory of recovery, or (2) the adoption of a statute designed to impose liability on the television or movie industry. This Article also discusses the

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1. Chicago Sun-Times, Aug. 21, 1980, at 48, col. 1.
2. *Id.* Aug. 23, 1980, at 81, col. 4.
3. N.Y. Times, Oct. 4, 1973, at 1, col. 2.
4. *Id.* May 27, 1971, at 1, col. 6.
5. *See* text accompanying notes 7–27 *infra*.

possibility of imposing a regulatory scheme of prior restraint on the showing of predictable harm type behavior.[6]

I. PREDICTABLE HARM TYPE BEHAVIOR

Generally speaking, the type of behavior portrayed in the media that may resurface in individual violent acts may be called "predictable harm" type behavior. It is necessary to clarify at the outset the definite distinction between the portrayal of "predictable harm" type acts and of generally violent acts. Admittedly, placing all acts of violence into either a "general" or "predictable harm" type category is a confusing over-simplification. Nevertheless, with common sense as our guide, we can readily see a difference between a relatively commonplace punch in the nose—a generally violent act—and throwing an infant out a twelfth floor window—a predictable harm type act.

Several characteristics are common to portrayals of predictable harm type behavior in the media. One characteristic is the rare or uncommon nature of the depicted act. An example of a rare or unique act is murder by means of carbon monoxide gas in order to simulate common illness. Further examples include murder by means of a "magnum" gun rather than an ordinary gun, assault with a karate blow rather than the more usual fisted punch, and a stabbing with a machete instead of a more mundane knife.

In many situations, depending on the television or movie plot, unique acts of violence are accentuated, even glamorized, when performed by a charismatic leading character—for example, a character portrayed by Clint Eastwood, Charles Bronson, or Bruce Lee. In the movies "Rebel Without a Cause" and "West Side Story," the lead characters were glorified by virtue of their ability to handle switchblade knives in fight scenes. Many similar examples exist. The significance lies in the impression left with the viewer. The viewer is led to believe that part of the hero's charisma is his facility at violence. Depicting ultra-violent acts in conjunction with a hero figure seems to increase the likelihood that these acts will be mimicked by a viewer attempting to achieve the status of a hero.

Another common characteristic of the method by which "predictable harm" type acts are portrayed is the detail with which these violent acts are presented. In order to glorify violent acts, producers and directors go to great lengths, using, for example, slow-motion, close-ups, or repetitions and reruns. These techniques saturate viewers with scenes of the act.

The techniques of uniqueness, glamorization, and detail are used by directors and producers to highlight violence. The net effect reinforces the act in the viewer's mind, directly increasing the likelihood of reproduction in real life: real-life imitation of art imitating life.

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6. *See* text accompanying notes 94–108 *infra*.

II. PSYCHIATRIC DATA (THE THEORY)

In order to impose liability upon the television or movie industry, one must first establish a basis for liability. To proceed by way of common law, statute, or regulation, it is essential that one establish actual or constructive knowledge on the part of industry executives that the mere showing of unique, glamorized, and detailed acts of violence results in a probability that the violent acts will be reproduced in real life.

General studies provide a plethora of information on the subject of violence. In 1975, the Rand Corporation collected and published a bibliography of research on the relationship between television and human behavior. The corporation uncovered over 2,300 studies or papers on the topic.[7] These empirical studies demonstrate a definite correlation between the depiction of violence in the media and audience aggression.

More specifically, in 1964, Leonard Berkowitz authored *The Effects of Observing Violence*.[8] In experiments, he tested the reaction of angered men to filmed violence. The "unique act" of violence he employed was a boxing scene from the movie "The Champion." After viewing this violent scene pitting a protagonist against an antagonist, subjects were given the opportunity to retaliate against insult-hurling co-workers who were actually confederates of the author. Berkowitz made the following observation:

> The results consistently showed a greater volume of aggression directed against the anger-arousing confederate by men who had seen the "bad guy" take a beating than by the men who had been led to feel sympathy for the protagonist in the film. It was clear the people who saw the *justified* movie violence had not discharged their anger through vicarious participation.[9]

Berkowitz also considered why aggressive incidents attributable to filmed violence are quite infrequent. In this regard, he drew three conclusions: first, most social situations impose constraints on aggression; second, only certain people are capable of drawing aggressive responses from a given person; and third, the predisposition towards aggressiveness translates into aggression only if appropriate cues are present.[10] Berkowitz's overall conclusion was that:

> [T]he major social danger inherent in filmed violence has to do with the temporary effects produced in a fairly short period immediately following the film. For that period, at least, a person—whether an adult or a child—who had just seen filmed violence might conclude that he was warranted in attacking those people in his own life who had recently frustrated him. Further, the film might activate his aggressive habits so that for the period of which I speak he would be primed to act aggressively.[11]

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7. *See* Rivers, *TV Violence: Is It Creating Greater Violence in Real Life?*, N.Y. Times, May 16, 1976, § 4, at 8, col. 4.

8. Berkowitz, *The Effects of Observing Violence*, SCIENTIFIC AM., Feb. 1964, at 35–41.

9. *Id.* at 38 (emphasis added).

10. *Id.* at 40.

11. *Id.* at 41.

Similar studies have been done with children as the subjects. One such study, conducted by O. Ivan Lovaas, is entitled *Effect of Exposure to Symbolic Aggression on Aggressive Behavior.*[12] In this study, one group of children was shown a film depicting an almost continual display of aggression including hitting and biting. The other group was shown a nonaggressive film of bears engaging in human-like play. Immediately afterwards, both groups were observed engaging in a bar pressing response that produced aggressive doll action. Mr. Lovaas noted:

> The study gave evidence of an increase in responding for the aggressive doll action after exposure to the aggressive film . . . . The effects of this visual exposure to symbolic aggression can be conceptualized either in terms of an increase in incentive motivation or in terms of providing discriminative stimuli marking the occasion when aggressive behavior will be reinforced.[13]

Shortly after the Lovaas study, Bandura and Ross published a study entitled *Imitation of Film-Media Aggressive Models.*[14] Bandura and Ross set out to test the hypothesis that children exposed to films portraying aggressive models would react more aggressively to subsequent frustration than children exposed to real-life aggressive models. The researchers concluded that "there is strong evidence that exposure to filmed aggression heightens aggressive reactions in children."[15]

The Media Task Force, in conjunction with Professor William R. Catton, Jr., of the University of Washington, prepared a study[16] analyzing experiments similar to those previously discussed. The analysis found three common effects evident in almost all studies of reactions to the observation of violent behavior.[17] The first effect is the "modeling effect." The modeling effect includes those cases in which the observer learns novel responses from what he has seen.[18] The second effect is the "disinhibited or inhibited effect," which contemplates that existing aggressive responses of the observer may be strengthened and that existing inclinations toward passivity may be weakened by the observation of violent behavior.[19] The third effect is the "eliciting effect." This effect describes the observer's stimulation to do something he had already learned to do.[20]

Professor Catton also suggests that the reason people often reenact what they have observed is that "one way to get attention from the television cameras is to behave in a 'newsworthy' way, which can mean to engage in

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12. Lovaas, *Effect of Exposure to Symbolic Aggression on Aggressive Behavior,* 32 CHILD DEV. 37, 37–44 (1961).
13. *Id.* at 43–44.
14. Bandura and Ross, *Imitation of Film-Media Aggressive Models,* 66 J. ABNORMAL & SOC. PSYCH. 1, 3–11 (1963).
15. *Id.* at 9.
16. Catton, *Mass Media As Activators of Latent Tendencies,* in MASS MEDIA AND VIOLENCE 301 (1971).
17. *Id.* at 303.
18. *Id.*
19. *Id.*
20. *Id.*

acts of disruption or violence which the television news people are likely to film for showing on the air."[21] The car-bomb killer in St. Louis illustrates this point. During the last few months of 1977, South St. Louis County was terrorized by an individual planting bombs in automobiles.[22] The bombs went off when the ignition was turned on. Dr. Bruce Danto, a police-trained psychiatrist, was asked to aid investigators. Dr. Danto characterized the killer as "a skilled, highly calculating loner who derives thrills from reading about his exploits."[23] The planting of car-bombs could have been stimulated in part by a quest for attention in the media.

There are, of course, some studies that discount the "violence begets violence" view. A three year, 1.8 million dollar study on the effects of television violence resulted in a comprehensive Surgeon General's Report.[24] Funded largely by the National Institute of Mental Health, this report grew out of Senator John Pastore's request for more evidence on whether a link exists between media violence and anti-social behavior. The summary of the report stated:

> Violence depicted on television can immediately or shortly thereafter induce mimicking or copying by children . . . under certain circumstances television violence can instigate or increase aggressive acts.
>
> The accumulated evidence, however, does not warrant the conclusion that televised violence has a uniform adverse effect nor the conclusion that it has an adverse effect on the majority of children.[25]

The cautious language used in the report created its share of controversy. Some people screamed "whitewash."[26] However, the Surgeon General, Dr. Jessie Steinfield, endorsed the report and later wrote, "[I]t is clear to me that the causal relationship between televised violence and antisocial behavior is sufficient to warrant appropriate and immediate remedial action."[27]

All these studies, even the more cautious ones, indicate that scientific evidence supports the conclusion that the portrayal in the media of particular kinds of violence stimulates violent acts in real life. These studies, however, are controlled laboratory experiments. In order to properly complement the theories espoused in these studies, it is necessary to cross the line between theory and reality by documenting actual cases involving predictable harm type responses following portrayal in the media of uniquely violent acts.

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21. *Id.* at 304.
22. Chicago Sun-Times, Nov. 15, 1977, at 34, col. 1.
23. *Id.* at 34, col. 3.
24. REPORT TO THE SURGEON GENERAL, TELEVISION AND GROWING UP: IMPACT OF TELEVISED VIOLENCE (1972).
25. Chicago Tribune, Apr. 11, 1972, § 2, at 3, col. 2.
26. *Id.*, Mar. 22, 1972, § 2, at 18, col. 7.
27. *Id.*

III. ACTUAL CASES (THE PROOF)

One of the most frequently cited cases of a predictable harm type response concerns a 24-year-old woman who was doused with gasoline and set afire in Boston.[28] On Sunday night, September 30, 1973, the American Broadcasting Company televised the movie "Fuzz." The film contained scenes of juvenile delinquents burning derelicts to death for enjoyment. On Tuesday, October 2, 1973, two days after the movie was shown, six youths forced a 24-year-old woman to douse herself with gasoline and they then set her afire. She died the next day. In a news conference, Police Commissioner Robert J. DiGuarzia suggested the youths might have been motivated by the aforementioned movie,[29] and went on to say "it's about time that the public demanded an end to violence such as this in our movies and on television."[30] Moreover, the following opinion was expressed in an editorial appearing in the *New York Times* on October 5, 1973:

> The dreadful coincidence cannot be ignored, however much the experts may continue to argue whether or not violence on the screen begets violence on the streets. Common sense and social responsibility ought to give the benefit of the doubt to the counsel against entertainment senselessly polluted with violence.
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> Dr. Abrahamsen, an acknowledged expert in this field of psychiatry, warned in his book,"Our Violent Society,"that "Aggression witnessed on television may serve as a stimulus, a triggering for hostile actions . . . ." The mindless violence which more than ever pervades the motion pictures as well as this year's television programming fits that description.[31]

A similar incident occurred in Miami less than two months later. On October 21, 1973, four teenagers set fire to a sleeping derelict.[32] The derelict died shortly thereafter. Later that night, the same teenagers set fire to a second man and tried to burn a third. The following day, three boys were charged with first-degree murder. Two of the boys were thirteen; the other was twelve.[33]

In Fort Lauderdale, on November 12, 1973, a gang of black men abducted a white man and his wife, doused the husband with a flammable fluid and set him afire.[34] Citing the Boston and Miami incidents, a newspaper article noted that "[b]oth attacks followed a television showing of the movie 'Fuzz' which depicted similar violence."[35]

Another well-documented incident involving predictable harm type behavior involved the "Doomsday Flight" imitations. On July 26, 1971, the movie "The Doomsday Flight" was shown in Canada. The movie plot con-

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28. N.Y. Times, Oct. 4, 1973, at 1, col. 2.
29. *Id.* at 34, col. 3.
30. *Id.*
31. *Id.* Oct. 5, 1973, at 30, cols. 1–2.
32. *Id.* Oct. 22, 1973, at 27, col. 8.
33. *Id.* Oct. 23, 1973, at 40, col. 8.
34. *Id.* Nov. 13, 1973, at 23, col. 1.
35. *Id.* at 23, col. 2.

cerned a bomb-hoax plot to extort money from an airline. In the movie, the extortionist said the plane was carrying a bomb set to detonate when the airliner flew below a specific altitude; for a price he would inform the officials of the bomb's location. On August 3, 1971, a British Overseas Airways 747 carrying 379 persons from Montreal to London was diverted to Denver because a caller said a bomb would detonate when the plane dropped below 5000 feet.[36] In a similar incident on March 2, 1971, an individual called Quantas Airline and said there were bombs designed to be set off by a change in air pressure aboard one of its 707's.[37] Authorities noted that the incident duplicated the plot of "The Doomsday Flight" shown on March 2.[38]

In response to bomb threats of this type, the Federal Aviation Administration asked 500 television stations in 150 cities to refrain from showing "The Doomsday Flight." John Shaffer, an F.A.A. Administrator, was quoted as saying, "Our great concern is that the film may have a highly emotional impact on some unstable individual and stimulate him to imitate the fiction situation in the movie."[39]

Many television and movie scripts involving robberies have also been simulated in real life. Two illustrations are the Brink's robbery in Montreal and the "Shaft" inspired holdup in Chicago.

In the Brink's robbery case,[40] robbers used a heavy machine gun mounted on a tripod in the back of a van to scare a Brink's driver into opening his armored car. The Montreal police described the weapon as an anti-aircraft gun. A month earlier, a "Blue Knight" episode had been broadcast in Toronto. In the episode, two robbers held up an armored car with an anti-tank gun mounted in the back of a van. The detective in charge, Jean Louis Helie, said he intended to get in contact with CBS for more details concerning the "Blue Knight" plot.[41]

On August 30, 1972, in Chicago, Illinois, three gunmen invaded a Japanese restaurant and held fourteen customers hostage for an hour.[42] The youths involved first met in a Chicago theater where "Shaft's Big Score" was playing. Witnesses in the restaurant described the conduct of the youths: "The gunmen threatened, kicked, and punched hostages and hurled racial insults at everyone who was not black . . . . The young gunmen acted as though they were acting in a movie."[43] Following the robbery, there ensued a city-wide police chase, which culminated in the crash of the gunmen's car. After the incident, police commented that "the violence-laden movie could

36. *Id.* Aug. 4, 1971, at 66, col. 8.
37. *Id.* May 27, 1971, at 1, col. 6.
38. *Id.* Aug. 10, 1971, at 75, col. 2.
39. *Id.* at 75, col. 8.
40. Chicago Tribune, Apr. 1, 1976, § 1, at 1, col. 2.
41. *Id.* at 1, col. 4.
42. *Id.* Aug. 30, 1972, at 1, col. 6.
43. *Id.* Aug. 31, 1972, § 1, at 2, col. 1.

have inspired the irrational conduct of the gunmen . . . and they pointed out that a highlight of the movie was a wild chase scene."[44]

The foregoing examples are illustrative of volumes of documented cases, all based on acts of violence portrayed in movies or on television.[45] Other cases include a man throwing an infant out of a twelfth floor window claiming he was inspired by television,[46] and a child suffocating a dog with a pillow after watching a similar suffocation on television.[47] Another documented television mimicking episode involved a ransom note scheme in Herrin, Illinois. A fifty-six year old woman attempted to extort money from individuals who believed their families were in danger. Under questioning as to her motives she said, "I did it because I saw it on T.V. I saw a show where a doctor was asked to pay money to a person, or the doctor's family would be hurt by a grenade."[48] A more recent example is the Chowchilla, California, kidnapping of twenty-six children and their bus driver by three wealthy men from the San Francisco area. Police believed at one point that the plot originated in the movie "Dirty Harry." One of the kidnappers did say his planning of the kidnapping was influenced by television crime shows.[49]

These incidents point out that the theories espoused in the previous section have merit. The actual damage caused by constant exposure to violence in the media has prompted some groups to take some positive steps to stop it.

IV. Public Response to Predictable Harm Type Behavior

Public reaction to the reenactment of media violence is varied. There has been no substantial regulatory action save one which occurred in Los Angeles.[50] A citizens watchdog group, the National Association for Better Broadcasting (NABB), persuaded a Los Angeles television station, KTTV, to sign an agreement to ban forty-two children's programs and to "graylist" eighty-one other programs. It has been suggested that the agreement was signed to avoid a licensing battle spearheaded by NABB.[51] This aggreement included blacklisting some violent cartoons such as "Magilla Gorilla," "Ultraman," and "Speed Racer." Among shows "graylisted" as unsuitable for children were "Batman," "Highway Patrol," "The Untouchables," "The Wild, Wild West," and "Mod Squad." The agreement called for a cautionary announcement before all graylisted shows which read: "Parents—we wish to advise that because of violence or other possible harmful ele-

44. *Id.* at 2, col. 1.

45. Liebert, *Television and Children's Aggressive Behavior: Another Look*, 34(2) AM. J. PSYCHOANALYSIS 99–107 (1974).

46. Chicago Tribune, Apr. 28, 1975, § 1, at 3, col. 4.

47. *Id.* Oct. 30, 1976, § 1, at 10, col. 1.

48. Chicago Sun-Times, Jan. 10, 1978, at 6, col. 1.

49. *Id.* Jan. 16, 1978, at 18, col. 1.

50. Chicago Tribune, Apr. 12, 1974, § 2, at 11, col. 1.

51. *Id.*

ments, certain portions of the following program may not be suitable for young children."[52]

After the agreement between NABB and KTTV was announced, the reaction among broadcasters and program syndicators was predictably unenthusiastic. Worlddivision, a syndication organization, appealed to the FCC to nullify the unprecedented pact.[53] Because many television executives considered KTTV's pact as "traitorous,"[54] it is unlikely that this method will again be successful.

Another reaction to the portrayal of violent acts on television comes from sponsors. The most blatant attack came from Miracle White, a Chicago-based manufacturer of nonphosphate laundry products. Miracle White stopped all advertising on violent T.V. programs, cancelling more than seventy commercials on the networks and local stations.[55] The company's policy is summarized in remarks made by its president, Leo Singer, at a Lions Club meeting:

> Our company, from this day forward, will in no way support any television program which in any way promotes violence. . . . We will not advertise on any show which purports to do so much damage to the people of our country. . . . We feel that it's time that television be shown there is more to life than just profits. We feel it is time that they're shown that there are some sponsors who care more about life than just looking at the bottom line.[56]

Miracle White and NABB must be commended for their attempts to curb television violence. However, one company or group acting alone cannot adequately reduce violence. To effectively reduce portrayals of unique acts of violence in the media, legal liability should be imposed on television and movie companies responsible for airing these violent scenes.

V. Imposition of Legal Liability: Negligence

Tort liability for harm resulting from the depiction of unique acts of violence on television or in the movies could be created by judicial decision or legislative enactment. In either case, portrayals of predictable harm type violence resulting in injury could lead to a negligence cause of action, with its elements phrased as follows:

> Any person, partnership, joint venture, or corporation that produces any work designed to be shown to the public will be liable for the physical harm caused to a member of the public as a result of the showing of that work if:
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> (a) it is shown by clear and convincing evidence that the proximate cause of plaintiff's injuries was a reaction by some member of the public to viewing the work;

52. *Id.*
53. *Id.*
54. *Id.*
55. The Denver Post, Oct. 24, 1973, at 38, col. 1.
56. *Id.* at 38, col. 2.

(b) it is shown by clear and convincing evidence that the act that was reproduced was excessively violent in fact; and

(c) the producers knew or should have known that the depiction of this violent act created a probability of its being reproduced in society.

Recovery under such a negligence theory would be grounded in a duty of television and movie producers to produce films and programs free from unique acts of violence that are or should be known to cause mimicking responses. This duty would be owed to the general public. When unique acts of violence are portrayed in the media, the duty is breached and liability would obtain for resultant harm. Liability under this negligence cause of action would be based on the television or movie producer's failure to prevent the unique act of violence from being shown where he knew or should have known the act might be reproduced.

Most troublesome in the above negligence analysis is the element of causation. Admittedly, this is a difficult obstacle to overcome. Tort liability requires proof that the defendant television or movie producer *caused* an injury to the plaintiff.[57] Nevertheless, courts have been willing to extend the causation element in order to establish protracted liability for negligence. An example is found in *Weirum v. RKO General, Inc.*[58] In that case, a rock radio station conducted a contest that rewarded the first contestant who could find a peripatetic disc jockey. While responding to clues broadcast by the radio station, two minors in excited pursuit of the disc jockey negligently forced a car off the highway, killing its sole occupant. The jury found the defendant radio station liable for negligence. In affirming the jury verdict, the Supreme Court of California stated:

> If the likelihood that the third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here, reckless conduct by youthful contestants, *stimulated* by defendant's broadcast, constituted a hazard to which decedent was exposed.[59]

This accepted view of protracted causation could likewise embrace a predictable harm event. The media, by showing unique, detailed, and glamorized incidents of violence, knowingly create a hazard that a viewer may imitate unique violence. Because the viewer's behavior is foreseeable,[60] the viewer's act is not the superceding cause of harm to the victim.[61] The media's stimulating presentation of violence is the cause, and the media should be liable for the harm that results.

It is especially appropriate that media corporations be held financially

57. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971).
58. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).
59. *Id.* at 47, 539 P.2d at 40, 123 Cal. Rptr. at 472 (emphasis added) (citations ommitted).
60. *See* text accompanying notes 7–49 *supra*.
61. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 43–44 (4th ed. 1971).

responsible, whether by legislative act or judicial decision, for harm caused to an innocent victim. These corporations profit from the very presentation of violence that causes the victim's harm. In a just and fair system, profit from an activity should be made available to compensate the victim of that activity.

A judicial or legislative theory of tort recovery for "predictable harm," therefore, seems both plausible and appropriate. Another possible means of remedy for this problem would be a statutory or regulatory scheme prohibiting the media depiction of uniquely violent acts.[62] Both tort liability for and prior restraint of media presentations, however, present possible collisions with first amendment freedoms. Nevertheless, the problems seem resolvable.

VI. PREDICTABLE HARM AND THE FIRST AMENDMENT

Although first amendment[63] rights are given great deference by the courts, it is well established that the right of free speech is not absolute at all times and under all circumstances.[64] Even in a society which regards freedom of speech as one of its cherished possessions, the interest in complete freedom of expression must be reconciled with other fundamental rights of the citizenry through the process of comparison that has come to be called balancing.[65]

First amendment obstacles are avoided in a negligence cause of action for predictable harm from media violence because, owing to the causal connection between visual violence and antisocial behavior, the type of speech at issue should not be protected by the first amendment. In this instance, freedom of speech is outweighed by the citizens' interest in personal safety and law and order. To substantiate this argument, three types of unprotected speech—obscenity, defamation and fighting words—are examined. The rationale for not protecting these types of speech leads to the inescapable conclusion that predictable harm type speech should likewise be unprotected.

Another problem related to whether predictable harm should be outside the scope of the first amendment is how a regulatory scheme or tort liability should be implemented. Consequently, the applicability of the judicially created concepts of clear and present danger and prior restraint will also be discussed.[66]

A. *Obscenity*

In *Roth v. United States,*[67] the appellant was convicted of violating

62. *See* text accompanying notes 95–108 *infra.*

63. U.S. CONST. amend. I.

64. *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919).

65. *See* Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576, 590–94 (1969); American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 393–400 (1950); NAACP v. Alabama, 357 U.S. 449 (1958).

66. *See* text accompanying notes 94–108 *infra.*

67. 354 U.S. 476 (1957).

federal[68] and state statutes[69] prohibiting "obscene, lewd, lascivious, filthy, or indecent material from being mailed or written." The Supreme Court upheld the conviction and stated as part of its holding that "obscenity is not within the area of constitutionally protected speech or press."[70] The Court recognized that "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests,"[71] but concluded that obscenity is utterly without redeeming social importance.[72]

Does the visual depiction of a woman being doused with gasoline, or of a unique way to hijack an airplane, or of an unusual method of poisoning someone's food, have redeeming social importance? Many psychologists, sociologists, and other behavioral scientists have shown a correlation between the observation of an act of violence and its subsequent commission by the individual.[73] If the correlation exists, it becomes necessary to balance the social benefit of showing unique acts of violence against the ultimate harm to society. Of course, because the balancing test is here applied only to "unique acts of violence" and not to depictions of "ordinary violence," the first amendment guarantees of free speech will be weighed against resulting behavior which is clearly antisocial and harmful.

The problem presented is not unique. The proponents of censoring obscenity faced the identical two-step analysis involved here. First, it was necessary to establish the causal connection between antisocial behavior and obscenity. Second, it was necessary to prove that speech resulting in antisocial behavior does not warrant first amendment protection.

Concern for public safety and public morals pervades the law of obscenity. The proponents of censoring obscene materials assert that a connection exists between sexually explicit expression and behavior that the state has a duty to punish and prevent.[74] And although this connection between obscenity and its alleged antisocial effect is elusive,[75] the courts still uphold convictions in obscenity cases.[76] Therefore, the less elusive causal connection between visual violence and antisocial behavior should not prevent courts from meeting their duty to hold responsible those who create harm to others through the portrayal of unique acts of violence in the media.

If media portrayals of unique acts of violence are not considered consti-

68. Ch. 645, 62 Stat. 768 (1948) (current version at 18 U.S.C. 1461 (1976)).
69. CAL. PENAL CODE § 311 (West 1955).
70. 354 U.S. 476, 485 (1958).
71. *Id.* at 484 (1958).
72. *Id.*
73. *See* text accompanying notes 7–27 *supra*.
74. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973); Stanley v. Georgia, 394 U.S. 557, 567 (1969).
75. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58–62 (1973); Stanley v. Georgia, 394 U.S. 557, 566–67 (1969).
76. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

tutionally protected speech, proof of a causal connection supporting "predictable harm" legislation will be sufficient if there exists a rational basis for believing the asserted causal link between showing a "unique act of violence" and its subsequent reenactment.[77] In spite of conflicting interpretations of the empirical data, many researchers have concluded that this causal connection does exist.[78] Consequently, a rational basis for "predictable harm" legislation cannot be doubted. The causal connection is between portrayals of predictable harm type violence and behavior that is indisputably antisocial. The conclusion that portrayals of unique violence should be constitutionally unprotected is the next step in the analysis.

B. *Fighting Words*

The fighting words doctrine is illustrated by the opinion of the United States Supreme Court in *Chaplinsky v. State of New Hampshire*.[79] In 1942, a Jehovah's Witness named Chaplinsky was arrested on a public street while distributing literature denouncing all religion. Chaplinsky called the arresting officer a "god damned racketeer" and a "damned fascist," and said the "whole government of Rochester are fascists or agents of fascists."[80] Affirming defendant's conviction for violating a state statute and refuting defendant's first amendment argument, the Supreme Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well-observed that such utterances are no essential part of any exposition of ideas, and are of such *slight social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[81]

Chaplinsky was decided in 1942, fifteen years prior to *Roth v. United States*,[82] yet the same inquiries into the social value of the speech sought to be protected were made in both cases.[83]

There are striking similarities between fighting words and media depictions of unique violence. Both are of slight social value and both foreseeably incite violence and harm. These similarities lead to the conclusion that presentation of predictable harm type behavior, like fighting words, should not be protected by the first amendment. The statute's purpose in *Chaplinsky*

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77. "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably conclude that such a connection does or might exist." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

78. *See* text accompanying notes 7-27 *supra*.

79. 315 U.S. 568 (1942).

80. *Id.* at 569.

81. 315 U.S. 568, 571-72 (1942) (emphasis added).

82. 354 U.S. 476 (1957).

83. *Compare* Roth v. United States, 354 U.S. 476, 481-85 (1957), *with* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

like the cause of action proposed here, is to preserve the public peace; no words were "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."[84] The *Chaplinsky* statute sought to prohibit only speech that had a direct tendency to cause acts of violence. Predictable harm liability would likewise seek to except from first amendment protection visual displays having a direct tendency to cause acts of violence. Moreover, the effects of visual violence tend to be immediate, the same result sought to be checked by the statute held constitutional in *Chaplinsky*.[85]

C. *Defamation*

In *Beauharnais v. Illinois*,[86] the United States Supreme Court upheld the constitutionality of an Illinois group libel statute on the grounds that, "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech."[87] The Court went on to include libel in the same class of unprotected speech as obscenity.[88]

Since 1952, several important Supreme Court decisions have affected the law of defamation.[89] That the Court has narrowed this unprotected area is not to be denied. However, like obscenity and fighting words, defamation, with its myriad of decisions concerning what standards of proof are applicable,[90] nevertheless remains a form of unprotected speech in circumstances not covered by these limited decisions.[91]

It is beyond this Article's scope to detail the many intricacies of the law of defamation. For our purposes it suffices to point out that defamatory expression is sometimes unprotected by the first amendment.[92] Moreover, when defamatory speech receives first amendment protection, the protection is based not on the value of the defamation, but rather is the result of our zealous guard against encroachments on protected speech.[93] With regard to unprotected media showings of unique violence, certain restrictions are likewise necessary in order to preserve the integrity of the first amendment.

D. *Censoring Presentations of Predictable Harm Type Material*

If certain types of violence depicted in the media may be subjected to

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84. 315 U.S. 568, 573 (1942) (citing New Hampshire v. McConnell, 70 N.H. 294, 47 A. 267 (1900); New Hampshire v. Brown, 68 N.H. 200, 38 A. 731 (1895)).

85. 315 U.S. 568, 573–74 (1942).

86. 343 U.S. 250 (1952).

87. *Id.* at 266.

88. *Id.*

89. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

90. *See* cases cited in note 89 *supra*.

91. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118 (4th ed. 1971).

92. *Id.*

93. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341–42 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 152–54 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 347–48 (1978).

some form of review that is constitutionally permissible, in what manner should a predictable harm standard be implemented? Generally speaking, there are two avenues of approach that can be utilized to reach the desired result of preventing this antisocial behavior. The first approach, previously discussed, is to impose tort liability subsequent to a showing of unique media violence. Conversely, there is the possibility of restraining the undesirable portion of the movie from being shown prior to its release. This second option would prevent the showing of the unique act of violence by censoring or editing the particular scenes out of the television program or movie. Admittedly, prior restraint of expression is generally despised, and "a free society prefers to punish the few who abuse the right of speech *after* they break the law than to throttle them and all others beforehand."[94] The prior restraint method of preventing predictable harm therefore presents unique constitutional problems.

Notwithstanding the fact that the doctrine of prior restraint imposes a heavy burden upon the government to justify its prior interference with expression, the belief that all prior restraints are prohibited is conceptually too broad, for "the protection even as to previous restraint is not absolutely unlimited."[95]

In *Freedman v. Maryland*,[96] the Supreme Court held a motion picture censorship statute[97] unconstitutional for not complying with certain "procedural safeguards designed to obviate the dangers of a censorship system."[98] These procedural safeguards include the following:

> First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Finally,] the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[99]

Known as the *Freedman* test, these procedural safeguards have been applied to areas outside of movie censorship statutes.[100] The test fortifies the belief that certain unique acts of violence could be censored and still conform with first amendment freedom of speech requirements.

In addition, the clear and present danger test formulated by the Supreme Court indicates that injunctions against speech are constitutional under

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94. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975); *accord*, Freedman v. Maryland, 380 U.S. 51, 58 (1965).

95. Freedman v. Maryland, 380 U.S. 51, 54 (1965) (quoting Near v. Minnesota, 238 U.S. 697, 715 (1931)).

96. 380 U.S. 51 (1965).

97. MD. ANN. CODE, art. 66A, § 2 (1957).

98. 380 U.S. 51, 58 (1965).

99. *Id.* at 58–59.

100. *See* Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976).

certain circumstances. In *Schenck v. United States*,[101] defendants were convicted of advocating disruption of governmental recruitment during the First World War. Despite first amendment objections to allowing Congress to make any law abridging freedom of speech, Mr. Justice Holmes reasoned:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in . . . such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.[102]

It was this language that spawned the "clear and present danger" test.

It is beyond the scope of this article to discuss all the changes in the clear and present danger doctrine over the past fifty-nine years, but a few points should be noted. First, the clear and present danger doctrine applies only to protected speech.[103] Hence, if these unique acts of violence are considered unprotected speech, as proposed earlier, the clear and present danger test is inapplicable. Alternatively, even if presentation of predictable harm type conduct is considered protected speech, depiction of these unique acts of violence causes a substantive evil—reenacted violence—that Congress has a right to prevent. Hence, the clear and present danger test is satisfied, and such presentations could be prohibited.

The *Freedman* test and the "clear and present danger" test directly concern certain types of speech and whether they should or should not be censorable. Of equal importance is the regulation of the noncommunicative aspect of speech. The basic test is that the regulation must further an important governmental interest unrelated to suppressing the message being communicated.[104] Moreover, that regulation must only incidently restrict speech and the restriction must be no greater than is essential to the furtherance of the governmental interest in question.[105]

Examples of valid regulations that incidentally affect speech are an ordinance making it a misdemeanor to solicit business at a private residence without obtaining the owner's prior consent,[106] a narrowly drawn ordinance prohibiting loud sound trucks on the streets,[107] and a statute banning distribution of commercial handbills on the streets to avoid littering.[108] The "important governmental interests" involved in these examples include the right to

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101. 249 U.S. 47 (1919).

102. *Id.* at 52 (emphasis added).

103. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952). For the normative side of this question, *see* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 339 (1978); Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1169 (1970).

104. United States v. O'Brien, 391 U.S. 367, 377 (1968).

105. *Id.*

106. Breard v. Alexandria, 341 U.S. 622, 624–25 (1951).

107. Kovacs v. Cooper, 336 U.S. 77 (1949).

108. Valentine v. Chrestensen, 316 U.S. 52 (1942).

privacy, noise control, and litter prevention. The governmental interests underlying regulation of the presentation of predictable harm type conduct would be the prevention of murder, rape, robbery, and extortion. These interests are more essential than the protection of privacy, noise control, and littering. Moreover, a statute or regulatory scheme prohibiting only media presentations of unique acts of violence would minimally restrict media expression and impose the least regulation necessary to protect the government's interest. Thus, such a statute or regulation would be constitutionally permissible under this noncommunicative impact analysis, as well as under a clear and present danger analysis, if enacted with the *Freedman* test procedural safeguards.

VII. CONCLUSION

As evidenced throughout this Article, media people should know that harmful, violent acts portrayed in their productions create a likelihood that the acts may be reproduced in real-life. Admirably, plaintiffs have initiated suits based on "predictable harm" type fact patterns.[109] It is now time to take the next step towards preventing the media from hiding behind the first amendment when their productions result in severe injuries.

It is now incumbent on the legislative branch of government to draft a statutory scheme or regulation that prohibits harmful presentations of unique media violence or insures that plaintiffs injured as a result of violent imitation of a media production will have a means of seeking relief. It is likewise incumbent upon our judicial system to approve a recovery mechanism that will afford victims of predictable harm type violence compensation from those who profit by the commercial presentation of material that predictably causes harm.

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109. *See, e.g.*, Olivia N. v. National Broadcasting Co., 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *stay denied sub nom.* National Broadcasting Co. v. Niemi, 434 U.S. 1354 (1978) (Rehnquist, Cir. J.), *cert. denied*, 435 U.S. 1000 (1978).